No. _____ (1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 2004

BENON JOHN TRAWINSKI,
PETITIONER,

V.

UNITED TECHNOLOGIES CARRIER CORPORATION;
COMFORT SYSTEMS, U.S.A. (OWNER AND
PARENT CORPORATION OF STANDARD HEATING
AND AIR CONDITIONING CO.),
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals depart exceedingly from the accepted and usual course of judicial proceedings and did this Court of Appeals sanction such departure by the lower Court?

CORPORATE DISCLOSURE STATEMENT

Respondent Comfort Systems, U.S.A., hereinafter called Comfort Systems, is a corporation incorporated under the laws of the State of Delaware, having its corporate headquarters at 777 Post Oak Boulevard, Houston, Texas 77056. Comfort Systems is the owner and parent corporation for Standard Heating and Air Conditioning Co., hereinafter called Standard Co..

Respondent United Technologies Carrier Corporation (hereinafter called Carrier) is a corporation incorporated under the laws of the State of Delaware. Its North American Operations are headquartered at Carrier Parkway, Syracuse, New York 13221. The address of its corporate headquarters is United Technologies Carrier Corporation, One Carrier Place, Farmington, Connecticut 06034.

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OPINION BELOW

The United States Eleventh Circuit Court PER CURIAM of July 7, 2004 is reproduced in the Appendix at pages 1-6. The PER CURIAM August 26, 2004 Order denying Petition for Rehearing is reproduced in the Appendix at page 7.

JURISDICTION

The judgment (App. 1-6) sought to be reviewed was entered July 7, 2004. This petition for a writ of certiorari is being filed within 90 days after denial of the Petition for Rehearing (App. 7), pursuant to the United States Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES

The criminal statutes involved in this case are codified in Alabama Criminal Code Title 13A and are classified under Chapter 6, Article 2 as Assaults. These statutes read as follows:

> § 13A-6-23. Menacing.
>
> (a) A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury.
> (b) Menacing is a Class B misdemeanor. (Acts 1977, No. 607, p. 812, § 2110)
>
> § 13A-6-24. Reckless Endangerment.
>
> (a) A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a

substantial risk of serious physical injury to another person.
(b) Reckless endangerment is a Class A misdemeanor. (Acts 1977, No. 607, p. 812, § 2115)

§ 13A-6-25. Criminal coercion.

(a) A person commits the crime of criminal coercion if, without legal authority, he threatens to confine, restrain or to cause physical injury to the threatened person or another, or to damage the property or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an unlawful act or refrain from doing a lawful act.
(b) Criminal coercion is a Class A misdemeanor. (Acts 1977, No. 607, p. 812, § 2125)

A civil statute involved in this case is codified in Alabama Civil Code and read as follows.

§ 6-5-104. Deceit - Fraudulent deceit.

(a) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage he thereby suffers.
(b) A deceit within the meaning of this section is either:
(1) the suggestion as a fact of that which is not true by one who does not believe it to be true;
(2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
(3) The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or
(4) A promise made without any intention of

performing it. (Code 1923, §§ 7353, 7354; Code 1940 T.7, §§ 111, 112)

PETITIONER COMMENT Re STATUTES. As stated in petitioner's Brief (R1-23 at 5), "the criminal statutes may provide guidelines (and specifics) for civil tort liability." Regarding the civil statute for fraudulent deceit in Alabama Code (argued in R1-23 at 1-2), which reached defendants' conduct at the deposition, petitioner's averments indicated that although defendants did not close the requisites to complete fraud, their purposeful persistent deceitfulness over the two days deposition for petitioner added to the cumulative impact on petitioner resulting in distress.

STATEMENT OF THE CASE

This diversity action was commenced on September 30, 2002 when the petitioner, who is a resident citizen of the State of Alabama, filed a complaint in the United States District Court for the Northern District of Alabama, Southern Division, against the Respondents Carrier and Comfort Systems. Petitioner averred a claim against respondents for "intentional and reckless infliction of severe emotional distress during two full days of deposition by two attorneys for defendants" whose "outrageous conduct was the proximate cause of a serious injury." R1-1 at 1-2.

Petitioner and his wife were pro se deponents during three days of deposition 29 September, 3 October, and 17 October 2000 connected with a State trial for a single claim of breach of contract[1] scheduled for December 2000; conducting the deposition were attorneys for Carrier and Standard Co. owned by Comfort Systems.

Soon after the Complaint was filed in the U.S. District Court, an Order (App. 28-29) was issued essentially barring petitioner from FRCP 4, if the Complaint was not served within 11 days[2]. After petitioner's filing of the Response to the Order (R1-3) almost three months passed when petitioner's anxiety was abated as a result of his filing of Motion for Confirmation (R1-4) [of an assurance over the telephone] followed by the Order (App. 27) allowing the 120 days under FRCP 4(m); this correction by-

[1] The claim was the reinstated (July 1998) remnant of a suit involving breach of contract, breach of warranty, negligence, and fraud, which suit was totally dismissed on summary judgment in May 1998. R1-1 at 8. The breach of contract was again dismissed by a new Trial Judge in early 2000 without any legal basis; the Judge, after much trouble on plaintiffs' part, eventually reinstated thereafter the breach of contract count for which the deposition was conducted in connection with the December 2000 scheduled jury trial.

[2] At the time of filing, petitioner was still feeling too ill to contemplate a possible amendment within the 11 days; there was no court action to petitioner's Response to the Order, in which he is asking for reconsideration of the time.

passed the facts of the original Order.

In response to the Pleadings, defendants filed motions to dismiss. R1-11 and R1-13. With these motions, both defendants wrote letters to the Magistrate Judge bringing up briefing schedule. Scheduling Orders were issued for Carrier and Comfort Systems and for plaintiff-petitioner (App. 25 and 26). It was with reference to the briefing schedule that Carrier filed with its Brief (R1-16) in Support of Motion to Dismiss and Motion for Attorneys' Fees (the latter later withdrawn) matters outside the pleadings that consisted of Attorney for Carrier's Affidavit, unnotarized, in which he refers to the State case deposition transcript in his ¶ 6.

The State case deposition transcript was released by the court reporter in violation of Alabama, and Federal Rule of Civil Procedure 30(e). As it turned out only part of such deposition transcript was filed by the defendant with the U.S. District Court through an anonymous entry under the Docket No. 17; this deposition transcript was not served on petitioner.

Carrier also filed with the U.S. District Court an Affidavit of the court reporter (the same person who released the deposition transcript) - supposedly resembling the reality at the deposition - raising an issue that did not even arise at the deposition. R1-25. This out of time filing was granted by an Order (App. 11).

Petitioner's filed Brief (R1-23) contained matters not outside the Pleadings with attached affidavits attesting to the authenticity of statements in the Pleadings and controverting defendants' evidence.

On November 12, 2003 the Magistrate Judge issued a Report and Recommendation (App. 12-23) granting defendants' motions to dismiss which had been converted to motions for summary judgment. In response, plaintiff filed Objection (R1-30) in which

among the list of evidentiary material offered are medical records including clinical evidence. This was followed by November 25, 2003 Order of Reassignment (App. 10). The United States District Court Judge to whom the case was assigned issued Memorandum of Opinion (App. 9) and Order of Dismissal (App. 8), both on December 1, 2003.

The Eleventh Circuit PER CURIAM (App. 1-6) affirmed dismissal on the 12(b)(6) level. The Eleventh Circuit judgment, which petitioner seeks to have reviewed, was entered July 7, 2004. Petition to the Eleventh Circuit for Panel Rehearing was denied August 26, 2004 (App. 7).

ARGUMENT IN SUPPORT OF PETITION AND REASONS FOR GRANTING THE WRIT

Petitioner relies on Rule 10(a) of the United States Supreme Court, which indicates the character of the reasons the Court considers for granting review: "a United States Court of Appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power; ..."

I. THE DECISION BY THE COURT BELOW IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Prior decisions of this Court compel the conclusion that the Eleventh Circuit decision to affirm the District Court dismissal of petitioner's cause of action on the 12(b)(6) level is in direct conflict with this Court's decisions. In *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974) this Court held that "...the allegations of the complaint should be construed favorably to the pleader." In *Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1984), this Court held that a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Conley* this Court held that a court should dismiss a suit under FRCP 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley* at 45-46. To all indications of this Court's holdings, petitioner's cause of action should withstand a challenge under FRCP 12(b)(6) motions to dismiss. The Eleventh Circuit's decision regarding affirmation

of the District Court's dismissal resulted from a switchover[3] from the summary judgment standard to the 12(b)(6) standard.

II. THE DISTRICT COURT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE ELEVENTH CIRCUIT SANCTIONED SUCH DEPARTURE IN CASE WHERE THE PLEADINGS ARE FAR MORE THAN SUFFICIENT Re EVIDENCE.

Petitioner's Complaint (R1-1) and Amendment to Complaint (R1-6), jointly referred to as Pleadings[4], sets out all the facts essential to constitute a legal cause of action and contains sufficient allegations showing that an actionable wrong was done by concert of action and common intent and purpose - a joint infringement of plaintiff's rights as a person. The Pleadings aver that defendants breached their legal duty by intentionally inflicting severe emotional distress resulting in serious legal injuries proximately caused by their tortuous conduct.

The attorney for Standard Co. used a maxim concerning what defendants were entitled to do in the eyes of the law to misrepresent defendants' intent regarding the transgressions that were to follow. R1-6 at 3 and 7.

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[3]The dismissal of the case in the lower court was based on the change of motions to dismiss to motion for summary judgment without giving Notice to plaintiff-petitioner; plaintiff objected; one of the issues on Appeal was conversion of motions without notice, but the Appellate Court reverted to dismissal at the 12(b)(6) level, stating that "[t]he District Court did not need to convert the defendants' Rule 12(b)(6) motions into motions for summary judgment." However, an objective review of the Magistrate Judge's Report and Recommendation (App. 12-23) would show that the Judge's conclusion is based on matter defendants submitted outside the pleadings, and on the suppression by the Magistrate Judge of material facts and averments contained in petitioner's Pleadings.

[4]Petitioner's filed with the District Court Pleadings are based on personal knowledge and experience and transcriptions from deposition sound tapes preserved for petitioner by State Court Order and procured by plaintiff-petitioner.

Violating the governing laws of the State[5] (see Statutes section), defendants engaged in conduct that hardly can be described as merely adversarial by trickery, R1-1 at 9, ¶ (27), threatening, coercion, and intimidation, R1-1 at 10-11, ¶¶ (28), (31), R1-6 at 11-12, 14-15, and 17-21, ¶¶ (42), (46), (48), deceit and distortion of testimony, R1-1 at 10-11, ¶¶ (29), (31), R1-6 at 11-12 and 15-21, ¶¶ (42), (47), (48), menacing and reckless endangerment, R1-1 at 10 and 12-13, ¶¶ (30), (36), R1-6 at 17-21, ¶ (48), inappropriate body language, R1-1 at 10-11, ¶ (31), R1-6 at 13-14, ¶ (45), shouting, R1-1 at 10-13, ¶ (31), oppression, R1-1 at 11 and 13, ¶¶ (32), (37), R1-6 at 13-14 and 15-17, ¶¶ (45), (47), and humiliating giggling, R1-1 at 11, ¶ (33), R1-6 at 13-15, ¶¶ (45), (46).

Included among petitioner's averments is reference to plaintiff's "elderly gravely ill primary care physician who while undergoing an invasive test, sustained a serious medical accident and was recuperating from emergency surgery" (R1-1 at 11) and a quotation from the October 3, 2000 deposition sound tapes: "the doctor I'm referring to had ... accidental puncture of artery. He is very ill, so I'm not going to bring this up now." R1-6 at 14. (Plaintiff's reluctance to subject his elderly recuperating physician to questioning, at the time of his illness, by these defendants was taken against plaintiff in the Magistrate Judge's Report and Recommendation (App. 12-23)).

In addition to sufficiency, the Pleadings show that the deposition conducted by defendants has the following factual characteristics.

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[5]With respect to criminal coercion, as the legislative intent is "to deal with several forms of coercive conduct" (§ 13A-6-25 Commentary), the applicable parts of this statute are those related to specific averments in the Pleadings concerning the defendants' coercive and intimidating conduct. With respect to fraudulent deceit, the kind of deceit that was persistent during the two days of deposition for petitioner is generally subsumed by § 6-5-104(a), (b)(1) and mostly (2) of the Statute section of this petition.

SPECIAL RELATIONSHIP. The special relationship of the respondents (defense attorneys conducting the deposition) with the petitioner (pro se deponent) gave the respondents power over the petitioner to affect his interest. *Weiszmann v. Kirkland and Ellis*, 732 F.Supp. 1540, 1548 (D. Colo. 1990).

LENGTH OF RECKLESS CONDUCT. The three days of deposition conducted by defendants for a single claim of breach of contract scheduled for jury trial, two of those days for petitioner, during which days petitioner was subjected to conduct summarized in the numerous averments of the Pleadings (see enumeration of the paragraphs and their general content above, Part II of this Petition), shows the degree of the outrage; the issue at the deposition was not complex; it was based in the essentials for the installation of the 3½ ton heating and air conditioning system which can be stated in two lines on a page.

INTENT THAT GOES BEYOND ACCEPTABLE BOUNDS. Transcribed into the Complaint is evidence that petitioner had a mild stroke in 1996. R1-1 at 4-5. The Complaint avers that defendants knew about petitioner's prior health condition when, with deliberate indifference, they engaged in their injurious conduct at deposition. R1-1 at 12. Defendants' deliberate indifference was "intent to cause distress or a reckless disregard of the high probability of distress, and resultant severe emotional distress." *Stingley v. State of Arizona*, 796 F.Supp. 424, 431 (D. Ariz. 1992). Signs of petitioner's distress are discernible from the deposition sound tapes early on the first day of deposition September 29, 2000. R1-6 at 10. Defendants willfully ignored these signs of distress and the cumulative effect of their conduct on petitioner. Their deliberate intent to inflict injury and harm did not diminish even after petitioner's expression of concern for his health close to the end of the first day of deposition after he was shaken, and in fear as a result of counsel for defendant Carrier's menacing commotion followed by his reckless endangerment of plaintiff (R1-1 at 11); while this was occurring, counsel for

Standard Co. was standing at, and watching the door. The Pleadings show that the behavior of these defendants at deposition indicates "an intent that goes beyond all acceptable bounds." *Proudfoot v. Williams*, 803 F.Supp. 1048, 1054 (E.D. Pa. 1992). Late in 2001 after repeated review of that part of the deposition sound tapes, petitioner identified the two events at the deposition with violation of Ala. Code §§ 13A-6-23(a) and 13A-6-24(a). R1-1 at 12.

PAST CONDUCT OF DEFENDANTS. Not as part of averments, plaintiff's pleadings show in detail how defendants were engaged in a pattern of wrongful conduct, violating procedural and substantive law. R1-1 at 5-9; R1-6 at 12-13. Plaintiff's injury and loss proximately caused by defendants' conduct at deposition is a testimony of defendants' continuation of wrongful conduct against plaintiff-petitioner.

Closely related to the by-passing of the legal sufficiency of the Pleadings is the matter of suppressing and/or expressing skepticism concerning the material facts in the Pleadings. The departure from accepted proceedings is pervasive throughout the Magistrate Judge's Report and Recommendation (App. 12-23) and the Eleventh Circuit Per Curiam (App. 1-6); the addition of the fraud claim, an act against petitioner's Pleadings, not in accord with accepted judicial proceedings, contradicts the material facts and evidence whose existence is shown in sufficient detail in the Pleadings.

This Court held in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999) that "in reviewing the legal sufficiency of petitioner's cause of action [the Court] must assume the truth of the material facts alleged in the complaint." The Eleventh Circuit's statements in the Per Curiam on pages 2 and 4, using the qualifiers "even if" and "even taking" fall short of the requirement of assuming all material facts in the Complaint are true.

Petitioner notes from the Record that both defendants filed Motions to Dismiss (R1-11 and R1-13); additionally by way of letters to the Magistrate Judge suggesting briefs (copies of letters attached to Doc 11 and Doc 13 of petitioner's Record Excerpts to the Eleventh Circuit), briefs were scheduled by the Magistrate Judge (App. 25, 26) and filed; while defendants' purpose was to argue with matters outside the pleadings, petitioner's Brief (R1-23) was filed for the purpose to attest to the authenticity of quotations transcribed from the deposition sound tapes into the Pleadings and to controvert the accuracy and assertions of Carrier's filed matter.

The Magistrate Judge's Report and Recommendation arbitrarily includes a few averments from the Complaint and replaces by section titles the averments most damaging to defendants, including most averments in the Complaint, and all averments in Amendment to Complaint. The Report minimizes and by-passes fact events brought up in petitioner's Pleadings that are based on deposition sound tapes preserved by State Court Order and procured by petitioner. Because the Pleadings aver sufficiently the existence of evidence that supports petitioner's claim, the Report, by exclusive reliance on the defendants' transcript, failed to take material facts in the transcript as true. Under the presumption that the defendants' State case deposition transcript filed with the U.S. District Court, but not served on plaintiff, is genuine, it must correspond to the deposition sound tapes (both taken at the deposition by the same Court Reporter). The incomparable difference between the true facts transcribed into the pleadings from the deposition sound tapes, and the conclusions reached in the Magistrate Judge's Report and Recommendation suggests that there is something very wrong with the judicial process that led to such conclusions. In any case the affirmation of the Eleventh Circuit Court on the 12(b)(6) level sanctioned the lower court's departure from adherence to the 12(b)(6) standard.

III. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH PRECEDENT SET BY THE ALABAMA SUPREME COURT.

Alabama courts apply the law of the state where the injury occurred. *Glass v. Southern Wrecker Sales*, 990 F.Supp. 1344 (M.D. Ala. 1998). In petitioner's case, this is the State of Alabama. The Magistrate Judge's Report and Recommendation (App. 12-23), upon which the dismissal of petitioner's case is based, cites at App. 20 an Alabama Supreme Court case where three elements specifying Alabama law for intentional infliction of emotional distress are listed, but ignores the Supreme Court qualification of the applicability of the law when physical injury is involved and documented.

Referring to *Thomas v. BSE Industrial Contractors, Inc.*, 624 So.2d 1041, 1044 (Ala. 1993), the Eleventh Circuit sanctioned the lower court's basing its decision on three types of cases for intentional infliction of emotional distress - cases where physical injuries are not present - as the only categories of outrage worthy of submission to a jury. Yet the Alabama Supreme Court's finding (*Thomas* at 1041, 1042) that "[w]orker's generalized fear of cancer from exposure to asbestos did not rise to level of severe emotional distress necessary to support claim ... for tort of outrage *absent any clinical evidence that worker had suffered any injury from exposure*; ..." (emphasis added) is precedential support for the need to take clinical evidence of injury into account when considering the elements of the tort of outrage. In petitioner's case the Pleadings show in sufficient detail the existence of medical evidence supporting the averments of extreme and outrageous conduct, for the two days of deposition on the breach of contract claim resulting in serious permanent physical injury (R1-1 and R1-6). Further in response to the Magistrate Judge's Report and Recommendation (App. 12-23) converting motions to dismiss to motions for summary judgment without giving notice of intent to do so (FRCP 56(c)), petitioner filed Objection in

which, among the evidence offered to the Court, are copies of medical records (R1-30 at 2).

The Alabama Supreme Court finding in *Thomas* at 1041, 1042 has support in the Alabama Constitutional Provision Article I, § 13 stating that

> "...every person, for an injury done to him in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without .... delay."

The Magistrate Judge's Report and Recommendation minimizes and discounts the fact matter in the Pleadings: that defendants engaged in outrageous conduct at lengthy deposition inflicting recklessly severe emotional distress that resulted in injury and serious health problems in order to disable plaintiff from carrying his case before a jury in the State action[6], knowing that plaintiff was 76 years and that the United States Government would pay for an allowable share of the expenses through Medicare for health problems resulting from their tortuous conduct. The Report and Recommendation suppressed the fact that by defendants' intentional conduct, they essentially defrauded the federal government of more than $8,500.00 just for initial medical expenses.

The Eleventh Circuit Per Curiam states that plaintiff "was diagnosed as having a "Transient Ischemic Attack" on 10 October 2000," but gives no information about the circumstances. By failing to reveal that the 10 October 2000 diagnosis of plaintiff involved emergency admission and hospitalization preceded by

[6]On November 17, 2000 plaintiffs moved for dismissal of the State case for the single claim of breach of contract scheduled for jury trial in December 2000; the reason was the deteriorating health of the petitioner following the deposition.

October 6, 2000 examination (which is detailed in Appellate Brief, ¶ 19 at p. 10) by his primary care doctor for health problems stemming solely from defendants' tortious conduct (R1-1, ¶ (38) at 13) at deposition, and that the money damages sought included more than $8,500.00 for reimbursement to the United States Government for its Medicare coverage for this hospitalization, the Eleventh Circuit Court sanctioned the District Court's minimization of defendants' conduct and of the serious injury resulting from the conduct.

The Eleventh Circuit Court refers to "barbaric methods employed to coerce an insurance settlement," a case where no injury resulted, as recognized under intentional infliction of emotion distress. In petitioner's case companies, conducting three days of deposition with two days for petitioner, to protect against existing evidence of their breach of contract for a scheduled jury trial, used deceit, menacing, and reckless endangerment, among others, in further violation of the law to disable plaintiff and prevent him from bringing his evidence before a jury, inflicting permanent injury and resulting in other recurring health problems.

The Eleventh Circuit Per Curiam (p. 6) refers to intentional infliction of emotional distress as "an extremely limited cause of action," citing *Potts v. Hayes*, 771 So.2d 462, 465 (Ala. 2000), and goes on to state the three kinds of conduct recognized by the Alabama Supreme Court. The Eleventh Circuit, by endorsing the Magistrate Judge's Report and Recommendation's misrepresentative version of plaintiff's Pleadings and then supporting the concept of limitation in three categories or three kinds of conduct (both courts refer to the same group of cases), departed from the accepted course of judicial proceedings. The departure warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the Court of Appeals, and remand the case with directions to enter a judgment reversing the Order of the District Court (App. 8).

Respectfully submitted,

Benon Trawinski

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-10070
Non-Argument Calendar

D.C. Docket No. 02-02396-CV-B-S

BENON JOHN TRAWINSKI,

Plaintiff-Appellant,

versus

UNITED TECHNOLOGIES CARRIER CORPORATION, COMFORT SYSTEMS, U.S.A.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 7, 2004)

Before BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Benon John Trawinski appeals the district court's grant of summary judgment in favor of the defendants, United Technologies Carrier Corporation ("United Technologies") and Comfort Systems, USA ("Comfort Systems") as the parent

corporation of Standard Heating and Air Conditioning Co. ("Standard"), for intentional infliction of severe emotional distress ("IIED"). On appeal, Trawinski argues that the district court erred in (1) converting the defendants' motions to dismiss into motions for summary judgment without timely notifying him of its intent to convert the motions and (2) concluding that he failed to state a claim for IIED under Alabama law. We hold that, even if all of the allegations in Trawinski's complaint were true, the defendants' actions did not amount to extreme and outrageous conduct sufficient to state a claim of IIED under Alabama law. Accordingly, we AFFIRM the district court's decision to dismiss this case.

I. BACKGROUND

Trawinski, an Alabama citizen, brought this pro se civil diversity action against United Technologies and Comfort Systems asserting "intentional and reckless infliction of severe emotional distress during two full days of deposition of [Trawinski] by two attorneys for defendants," namely Robert H. Sprain and Christopher J. Zulanas. R1-1 at 1-2. Trawinski complained that, during his deposition taken on 29 September and 3 October 2000 in connection with his pro se state court action against the companies for fraud and breach of contract, these attorneys, while aware of Trawinski's poor health condition, violated Alabama Rules of Civil Procedure and Rules of Professional Conduct, questioned him with "trickery," asked him "harassing" questions, were hostile towards him, and intimidated him. Id. at 12. As a result, Trawinski alleged, he suffered "tightness on his head," general discomfort, elevated blood pressure, and double vision. Id. at 13-14. In addition, he was diagnosed as having a "Transient Ischemic Attack" on 10 October 2000. Id. at 14. Trawinski sought a total of $1,509,280.31 in monetary damages.

Trawinski subsequently amended his complaint to add a more detailed description of the deposition and to correct typographical errors. Trawinski complains that the attorneys did the following during his deposition: (1) interfered with his attempts to confer with his wife during her deposition; (2) attempted to force him "to answer questions the way [the attorneys] wanted them to be answered as reflected by Attorney Sprain's statement ... 'that's the way it's going to be'"; (3) accused him of prolonging the deposition; (4) threatened to "call [] in the Judge to intimidate [Trawinski] into answering questions he did not think he needed to answer"; (5) intentionally created and used false evidence regarding "the date of contract signing"; (6) "humiliat[ed] ... Trawinski by inappropriate body language and by giggling during his testimony"; and (7) ridiculed Trawinski for refusing to disclose the name of his treating physician by stating "[t]he doctor whose name ... Trawinski holds close to his vest and won't disclose." R1-6 at 9-15.

Comfort Systems and United Technologies moved to dismiss Trawinski's complaint pursuant to Fed. R. Civ. P. 12(b)(6) arguing, among other things, that Trawinski failed to show that the attorneys' actions amounted to "extreme and outrageous" conduct under Alabama law or that the companies could be held responsible for their attorneys' actions. In support of its motion, United Technologies submitted attorney Sprain's affidavit and a copy of the deposition at issue.

The magistrate judge entered orders setting deadlines for the parties submission of briefs and evidentiary materials concerning the motions to dismiss; there was no indication that it might convert the motions into summary judgment proceedings. After reviewing the transcript of Trawinski's deposition in its entirety, the magistrate judge recommended that the defendants' motions to dismiss be converted into motions for summary judgment and granted. The magistrate judge found that "nothing in that transcript comes even remotely near extreme and outrageous

conduct to support a claim under Alabama law," and the defendants merely were asking the questions necessary to defend their clients. R1-28 at 9-10

Trawinski objected to the magistrate judge's report arguing that the defendants' motions to dismiss were converted into motions for summary judgment without following the notice requirements of Fed. R. Civ. P. 56(c). He argued that, had he been notified, he would have submitted a complete deposition transcript, additional affidavits pointing out those particularly egregious acts by counsel and his resulting injuries, copies of his medical records, and the deposition tapes. The district court adopted the magistrate's report and recommendation over Trawinski's objections and granted summary judgment to the defendants.

II. DISCUSSION

A. Rule 56(c)'s Ten-Day Notice Requirement

Trawinski argues that the district court erred in converting the defendants' motions to dismiss into motions for summary judgment because it did not comply with the notice requirements of Rule 56(c). Under Rule 56(c), the district court must give the nonmoving party ten-days advance notice that a motion for summary judgment will be taken under advisement, and nonmovants are expressly allowed to serve opposing affidavits at any time prior to the day of the hearing. *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 (11th Cir. 1995). In addition, summary judgment cannot be entered against a party unless that party also has been given notice of his rights under Rule 56 and how he might best defend against summary judgment. *Griffith v. Wainwright*, 772 F.2d 822, 824-25 (11th Cir. 1985) (per curiam).

The record in this case indicates that the district court did not adhere to the notice requirements of Rule 56(c). However, we may nevertheless affirm the district court's judgment on any

ground. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 n.9 (11th Cir. 1998). As discussed below, even taking all of the allegations of Trawinski's amended complaint as true, Trawinski failed to state a claim for intentional infliction of emotional distress under Alabama law. Thus, it would have been proper for the district court to dismiss his complaint under Rule 12(b)(6). The district court did not need to convert the defendants' Rule 12(b)(6) motions into motions for summary judgment and did not need to comply with the notice requirements of Rule 56(c). Accordingly, the district court was correct to dismiss Trawinski's complaint for failure to state a claim of IIED.

B. Intentional Infliction of Emotional Distress

Trawinski argues that the conduct of the defendants' attorneys during his deposition amounted to IIED. Specifically, Trawinski maintains that the conduct of the "attorneys at deposition revealed their intent to do anything to prevail; it included harassment, intimidation, coercion, oppression, deliberate confusion, deceit, threats, shouting, inappropriate body language, giggling, ridicule, frenzied physical activity, and hostile menacing." Appellant's Br. at 9. He argues that this conduct was extreme and outrageous under Alabama law and caused him physical injuries.

"Whether the amended complaint sufficiently states a claim is a matter of law that we review de novo, assuming that all the allegations are true." *Kyle K. v. Chapman*, 208 F.3d 940, 942 (2000). "A complaint should not be dismissed [pursuant to Rule 12(b)(6)] for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marsh v. Butler County*, 268 F.3d 1014, 1022 (11th Cir. 2001) (en banc) (citation omitted).

To state a claim for IIED under Alabama law, the plaintiff must show that the "defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be

expected to endure it." *Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1043 (Ala. 1993). The Alabama Supreme Court explained that "[b]y extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Id.at 1043-44 (citation omitted).

Even assuming that all of Trawinski's allegations concerning the attorneys' actions during his deposition are true, those actions do not amount to "extreme and outrageous" conduct as defined by Alabama law. The Supreme Court of Alabama has stated that IIED is "an extremely limited cause of action," *Potts v. Hayes*, 771 So.2d 462, 465 (Ala. 2000) (per curiam), and has recognized this tort "in regard to only three kinds of conduct: (1) wrongful conduct in the family burial context, (2) barbaric methods employed to coerce an insurance settlement, and (3) egregious sexual harassment." Id. (internal citations omitted). Moreover the Supreme Court of Alabama has found that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to establish the tort of IIED. *Surrency v. Harbison*, 489 So.2d 1097, 1105-06 (Ala. 1986) (citation omitted). The behavior Trawinski complains of is not "beyond all possible bounds of decency." In fact, it is nothing more than "mere insults, indignities [and], ... annoyances," and does not rise to the level of extreme and outrageous conduct under Alabama law. As a result, Trawinski has failed to state a claim of IIED.

III. CONCLUSION

Because Trawinski fails to allege facts rising to the level of extreme and outrageous conduct under Alabama law, we affirm the district court's dismissal of his complaint alleging IIED.
AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-10070-DD

BENON JOHN TRAWINSKI,

Plaintiff-Appellant,

versus

UNITED TECHNOLOGIES CARRIER CORPORATION, COMFORT SYSTEMS, USA,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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BEFORE: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Benon John Trawinski is DENIED.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE
FILED AND ENTERED: 8.26.04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	02-B-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.),	)	
	)	
Defendants.	)	

ORDER

In accord with the Memorandum of Opinion entered contemporaneously herewith, it is hereby **ORDERED** that the defendants' motions to dismiss, which the court has converted to motions for summary judgment (doc. 11 & 13), are **GRANTED** and the plaintiff's claims are **DISMISSED WITH PREJUDICE.**

DONE, this 28th day of November, 2003.

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

Entered: 12.1.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-B-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

MEMORANDUM OF OPINION

The court has considered the entire file in this action together with the Magistrate Judge's Report and Recommendation and the plaintiff's objections and has reached an independent conclusion that the Magistrate Judge's Report and Recommendation (doc. 28) is due to be adopted and approved. The court hereby adopts and approves the findings and recommendation of the magistrate judge as the findings and conclusions of the court. In accord with the recommendation, the defendants' motions to dismiss, which the court has converted to motions for summary judgment (doc. 11 & 13), are due to be granted and the plaintiff's claims are therefore due to be dismissed with prejudice. An appropriate order will be entered.

DONE, this 28th day of November, 2003.

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

Entered: 12.1.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

ORDER OF REASSIGNMENT

This cause initially was assigned to the undersigned magistrate judge pursuant to the Court's General Order of Referral of Civil Matters to Magistrate Judges. The parties have not consented to the exercise of final jurisdiction by the magistrate judge under 28 U.S.C. § 636(c) and the undersigned has filed a report and recommendation concerning the complaint filed by the plaintiff. In accordance with the General Order, the case is now due to be assigned to a district judge for all further proceedings. Consequently, the Clerk is **DIRECTED** to reassign this case to the United States District Judge Sharon Lovelace Blackburn. The Clerk is **DIRECTED** to forward a copy of this Order to all counsel of record.

DONE, this the 25th day of November, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 11.25.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

ORDER

This matter is before the court on the motion of Defendant Carrier to submit its reply brief out of time. (Doc. 25). Premised on a showing of good cause, the motion is hereby **GRANTED**. [1]

DONE, this 12th day of November, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 11.12.03

[1] The court notes that the grant or denial of this motion did not impact the determination expressed in the report and recommendation filed contemporaneously herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This case is presently pending before the court on the motions to dismiss filed by Defendants Comfort Systems, U.S.A. (hereinafter "Standard") (Doc. 11)[1] and United Technologies Carrier Corporation (hereinafter "Carrier"). (Doc. 13). For the reasons set out herein, the defendants' motions are due to be granted and the plaintiff's claims are therefore due to be dismissed with prejudice.

BACKGROUND

The plaintiff, who is proceeding, *pro se*, filed his Complaint against the defendants alleging "Breach of Duty and Invasion of Rights," and "Causal Connection Between Breach of Duty, Invasion of Rights and Injury" on October 11, 2002. (Doc. 1). Thereafter, on January 16, 2003, the plaintiff filed an Amended

[1] References to "Doc. ____" are to the documents as numbered by the clerk of the court in the court's record of the case.

Complaint (Doc. 6) and a Second Amendment to Complaint (Doc. 7) that do not appear to allege any additional causes of action, but instead "relate[s] mainly to unintentional omissions in the Complaint ... [and] add[s] specific Material Facts in further support of plaintiff's cause of action, starting with method of referring to statements on tapes recorded at the Deposition, followed by introductory section pertaining to Tone and Defendants' Manner and Aim" (Doc. 6 & 7).

Prior to the filing of this complaint, the plaintiff instituted an action in the Circuit Court of Jefferson County, Alabama (CV97-06736-WJW) and two actions in the United States District Court for the Northern District of Alabama (CV01-N-1373-S and CV01-BU-2954-S) against these same defendants.[2] In the original Jefferson County Circuit Court case, the plaintiff alleged state law causes of action based on fraud and breach of contract. However, the plaintiff voluntarily dismissed that case and later filed his complaint in this Court "ask[ing] this Honorable Court to commence an independent action, in accordance with FRCP 60(b)(6) and Rule 60(b)(6) ARCP, based on the Amended Complaint of October 1997," which was the state court action. *Trawinski v. Standard Heating & Air Conditioning Co.* (CV01-N-1373-S, Doc. 1, p. 2). In that action, the plaintiff sought review of a state court summary judgment order dismissing four counts against the defendants. This Court issued a show cause order indicating that it did not have jurisdiction to review state court decisions. (*Id.*, Doc. 2). In his response, the plaintiff attempted to raise claims under the Energy Policy and Conservation Act ("EPCA"), which the Court dismissed on the grounds that it lacked subject matter jurisdiction. (*Id.*, Doc. 4).

Thereafter, the plaintiff filed his second action in this Court alleging violations of the EPCA and an unlawful conspiracy in violation of Title 42, United States Code, Section 1985(3).

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[2]An additional defendant, Weathertech Distributing Co., Inc., was named in the other three actions, but is not a defendant in the instant case.

(CV01-BU-2954-S). The Court dismissed the plaintiff's claims because they were time-barred and because the Court lacked subject matter jurisdiction. (*Id.*. Doc. 31). The plaintiff subsequently appealed the dismissal and the Eleventh Circuit Court of Appeals affirmed.[3] *Trawinski v. United Technologies*, 313 F.3d 1295 (11th Cir. 2002).

The actions complained of in the instant case arise out of a series of the plaintiff's depositions taken by counsel for Carrier and Standard during the discovery phase of the original Circuit Court action. Upon reading his complaint, and the amendments thereto, the plaintiff's allegations appear to be as follows: (1) that the "Defendants ignored [Alabama Rule of Civil Procedure 30(e)] and did not submit the transcribed deposition to the witness for examination; plaintiff did not waive such examination and reading, and would have welcomed the opportunity if offered" (Doc. 1, p. 3); (2) that defense counsel breached its duty and invaded the plaintiff's rights by engaging in questioning that "revealed the intent of trickery and created a feeling of apprehension because of past experience with defendants' filing of false documents, and their ruthlessness in misrepresenting facts ...;" (3) that the "defense attorneys used the fact that the judge scheduled the deposition in a courtroom to intimidate plaintiff ... by trying to force plaintiff to answer questions the way they wanted them to be answered"; (4) that "throughout a day of apprehension, being exposed to trickery, questions often imprecise, confusing and/or irrelevant, some seeking privileged information, plaintiff was blamed for prolonging the deposition when it was the defendants who were responsible by their interminable protracted, harassing questions and their unfamiliarity with the RECORD." (Doc. 1, pp. 9-12). Finally, regarding damages, the plaintiff alleges that the "Defendants and their attorneys breached their duty and plaintiff's rights; they not only intentionally inflicted emotional distress, but their conduct

[3]The Eleventh Circuit noted that, although the §1985(3) claim was properly dismissed by the District Court, it was dismissed for failure to state a claim rather than want of subject matter jurisdiction.

also proximately caused physical injury ..." (Doc. 1, p. 12). Further, "Defendants by their extreme and outrageous conduct have intentionally and recklessly inflicted severe emotional distress in plaintiff, their conduct was the proximate cause of a permanent and physical injury that is expected to reduce the years of life remaining for plaintiff ... and ... there is no way ... to restore plaintiff to his pre-deposition condition." (*Id.*, p. 14). Therefore, the plaintiff seeks $750,000.00 for their actual damages (emotional distress, physical damage, reduction in life expectancy, and future expenses), $750,000.00 in punitive damages, and $9,280.31 for reimbursement to the U.S. government and to the plaintiff's insurance carrier for medical coverage provided.

In response to the plaintiff's complaint and amended complaints, Defendant Standard and Carrier each filed a Motion to Dismiss all claims against them and briefs in support thereof. (Doc. 11, 13, 14 & 16). The plaintiff filed his response, (Doc. 23) to which Carrier replied by submitting the affidavit of the court reporter responsible for transcribing the depositions in question, Paige Paugh Scott. (Doc. 25). Because briefs, deposition testimony and affidavits were presented in support of and in opposition to these motions, the court will treat the motions as motions for summary judgment pursuant to Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). All parties have been given the opportunity to submit briefs and evidence on this matter.[4] (See Docs. 12, 15 & 23).

[4]Additional materials submitted were: (1) the plaintiff's deposition transcripts of 9/29/00 and 10/3/00 (doc. 17); (2) attachments to the plaintiff's brief in opposition to the defendants' motions to dismiss (Exhibit 1 -"Motion for Dismissal" in CV97-06736 with attached affidavit of plaintiff; Exhibit 2 - "Motion to Preserve Intact The Deposition Tapes Taken 9/29/00 and 10/3/00" in CV97-06736; Exhibit 3 - "Actions, Judgments, Case Notes" sheet form

While both defendants move for dismissal on the grounds that the plaintiff fails to state a claim for which relief can be granted, they do so for different reasons. As such, the motions will be treated separately herein.

Defendant Comfort Systems USA's Motion to Dismiss

In its motion to dismiss and brief in support thereof, defendant Comfort Systems argues that the plaintiff's complaints and amendments thereto are due to be dismissed with prejudice because the plaintiff improperly "attempt[s] to bring suit against this defendant ... as the alleged result of the conduct of Counsel that represented a subsidiary of this defendant [Standard Heating & Air] ... [for] allege[d] violations of the Alabama Rules of Professional Conduct, and the Alabama Rules of Civil Procedure, when in fact the underlying lawsuit was prosecuted in Federal Court."[5] (Doc. 11 at ¶ 2 (emphasis in original)). Additionally, Comfort Systems argues that "Plaintiff also attempts to plead a cause of action for the alleged violation of Alabama Code Sections 6-5-103 and 6-5-104(1975) based upon alleged misrepresentations ... during depositions[,] or in filings made with the Court in the prior litigations," and that the plaintiff has failed to state a cause of action upon which relief can be granted. (Doc. 11 at ¶ 4).

[4]continued - CV97-6736; Exhibit 4 - a copy of a check for $150.00 to American Court Reporting Services made out by Irene M. Trawinski; three affidavits of the plaintiff that are un-numbered; Attachment 1 - copy of the Complaint in CV97-6736; Amendment 2 - Notice of Appeal to the Alabama Supreme Court; Attachment 3 - Case Action Summary Continuation in CV97-6736; and Attachment 4 - an excerpt of the plaintiff's Eleventh Circuit Reply brief in the appeal of CV01-BU-2954-S (doc. 23); affidavit of Robert H. Sprain, Jr. (doc. 27).

[5]It appears from the record that this is inaccurate. The lawsuit underlying this action is the Circuit Court action and not one of the earlier-filed Federal Court actions.

Defendant Carrier's Motion to Dismiss

Defendant Carrier initially filed its Motion to Dismiss and Motion for Sanctions and Attorneys' Fees on February 13, 2003. (Doc. 13).[6] As grounds for its motion, Carrier asserts that the plaintiff's complaint "ostensibly alleges intentional infliction of emotional distress (the tort of outrage) ... through the conduct of legal counsel in [CV97-06736] ... [and a] further attempt to plead a cause of action for the alleged violations of Alabama Code Sections 6-5-103 and 6-5-104(1975) based upon alleged misrepresentations made by legal counsel during depositions or in filings with the court in [the circuit court action]," and that the plaintiff's complaints and the amendments thereto, fail to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 13 at ¶ 2). Further, Carrier argues that the plaintiff's allegations amount to violations of the Alabama Rules of Professional Conduct, which do not independently serve as a legal basis for a private cause of action. (Id., at ¶ 4). Lastly, Carrier argues that this case is due to be dismissed because Carrier owed no duty to the plaintiff "under tort law with respect to activities during discovery of a litigated case brought by the plaintiff." (Id. At ¶ 4).[7]

Plaintiff's Response to Defendants' Briefs

The plaintiff submitted one brief in response to the defendants' briefs wherein he clarifies that the only cause of action he is asserting is "intentional and reckless infliction of severe emotional distress during two full days of deposition," as well as any other torts the court wishes to derive from the plaintiff's "averments." (Doc. 23 at ¶ 1). The plaintiff expressly makes "no attempt to plead for fraud" and any reference to allegedly fraudulent statements made by defense counsel was for the

[6]However, on March 4, 2003, Carrier voluntarily withdrew its motion for sanctions and attorneys' fees (Doc. 20).

[7]This is the second paragraph four on page 3.

purpose of establishing that such "deceitful statements at deposition are inflicting, intentionally, severe emotional distress on plaintiff."[8] (Doc. 23 at ¶ 2). The remaining fourteen pages of the plaintiff's brief cites law regarding breach of duty and the defendants' "misconception" thereof, menacing, reckless endangerment, agency, and civil and criminal liability for tortious conduct. The plaintiff even attempts to show how the defendants "exhibited their culpable mental state ... by willful and oppressive conduct involving abuse of authority, shouting, threatening statements, and using body language and giggling to humiliate plaintiff." (Doc. 23, p. 8-9). However, as stated previously, the plaintiff makes no attempt to establish any additional causes of action. As such, the court need only address the outrage claim.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265(1986). The party asking for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the nonmoving party to demonstrate

[8]Likewise, the plaintiff makes similar statements regarding his claims based upon the Alabama Rules of Professional Conduct. For example, the plaintiff states that "'the object of the present action is the conduct of defendants through their attorneys at the year 2000 depositions'[sic] and reveals reason supporting the facts of the present action by introducing evidence of past conduct ... indicating that defendants are conscious wrongdoers. It follows that any plaintiff's reference ... regarding defendants' conduct outside the two days of deposition, is an affirmative assertion and evidence that these defendants are conscious wrongdoers, that is, their acts are either intolerable in a civilized society, or are in violation of procedural or substantive law, all used to benefit themselves and to the detriment of plaintiff." (Doc. 23, p. 3-4).

that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of her case on which she bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23; see Fed.R.Civ.P. 56(a) and (b). Once the moving party has met her burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial; however, the movant may not merely rest on the pleadings. (Id.).

After a motion has been responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

Intentional Infliction of Emotional Distress/Outrage

The plaintiff's assertions amount to a claim of intentional infliction of emotional distress. In Alabama, "the torts of outrage and intentional infliction of emotional distress are one and the same." *Wiggins v. Risk Enterprise Mgmt. Ltd.*, 14 F.Supp.2d

1279, 1283, n.2 (M.D. Ala. 1998) (citing *Stewart v. Matthews Indus., Inc.*, 644 So.2d 915, 918 (Ala. 1994)). To establish a cause of action for outrage, the plaintiff must show that the defendants' conduct: "(1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it." *Thomas v. Industrial Contractors, Inc.*, 624 So.2d 1041, 1043 (Ala. 1993) (citing *American Road Service Co. v. Inmon*, 394 So.2d 361, 365 (Ala. 1980)). The Alabama Supreme Court elaborated that, "[b]y extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and intolerable in a civilized society." *Inmon*, 394 So.2d at 365 (citing Comment (d) Restatement (Second) of Torts § 46 (1948)). In Alabama, outrage claims have only gone to a jury in three types of cases: (1) cases involving wrongful conduct in the burial of a family member; (2) cases involving "heavy-handed" and "barbaric" measures by an insurance agent in an attempt to settle an insurance claim; and (3) cases involving egregious sexual harassment. *Thomas*, 624 So.2d at 1044.

The conduct in question in the instant case arises out of conduct occurring during two days in which counsel for the defendants took the plaintiff's deposition for the original Circuit Court action. The Court has read the transcript of that deposition **in its entirety**. The court finds that nothing in that transcript comes even remotely near extreme and outrageous conduct to support a claim under Alabama law. (See *National Security Fire & Casualty Co. v. Bowen*, 447 So.2d 133 (Ala. 1983) (finding insurance agency's conduct in handling the plaintiff's claim to be extreme and outrageous where agents handling the claim threatened witnesses, attempted to bribe witnesses, threatened to kill the plaintiff's children or cut off their arms, and threatened to kill the plaintiff, among other things, in an attempt to get him to settle his claim). To the contrary, the court finds that the defense counsel asked questions necessary to defend the plaintiff's claims of fraud and breach of contract. Defendant counsel's conduct in asking those

questions, although uncomfortable for the plaintiff, was far from outrageous and extreme. (See *Surrency v. Harbison*, 489 So.2d 1097 (Ala. 1986) (finding insufficient evidence to establish the tort of outrage where plaintiff's employer cursed, bumped, shoved, pushed, and otherwise assaulted the plaintiff) and *Newton v. Town of Columbia*, 695 So.2d 1213 (Ala. Civ. App. 1997) (finding that an off-duty police officer's assault of the plaintiff that might have resulted in a deprivation of her constitutional rights was insufficient as a matter of law to rise to the "stringent standard of outrageous and extreme conduct adopted by our supreme court.")).

Furthermore, the plaintiff's refusal to answer routine and discoverable questions, such as the name of his treating physician when he is asserting claims for mental anguish and physical injury, is not only counter to the progression of his lawsuit, but is also in contravention of the state and federal discovery rules. The plaintiff must remember that it was he who brought the initial lawsuit and the defendants had a right to defend the claims brought against them. That is not to say that a defendant can use extreme and outrageous conduct to extrapolate information from a plaintiff; rather, the Rules of Civil Procedure proscribe the ways in which parties may attain information. However, the Court finds that, in this instance, the defendants acted within the parameters of those rules. [9]

While the plaintiff subjectively may feel that the line of questioning was invasive, the defendants were entitled to the information sought. The deposition is a fact-finding tool. A lawsuit is not a game of "hide the ball." While a deposition is not a "fishing expedition," the party taking the deposition is entitled

[9] It is clear from the deposition transcripts that Judge Vowell ordered the parties to conduct the plaintiff's deposition in his jury room; presumably so that he could oversee the deposition and be available should the plaintiff, who was proceeding *pro se*, have any questions or concerns.

to discoverable information consistent with the applicable rules of procedure.

Discovery in State Circuit Court is governed by the Alabama Rules of Civil Procedure, which "permit very broad discovery and the rules must be interpreted broadly and liberally construed." *Cole v. Cole Tomato Sales, Inc.*, 310 So.2d 210 (Ala. 1975). At the same time, "the right of discovery is not unlimited and ... the court [has] broad power to control the use of the process and to prevent its abuse by any party." *Ex parte Alabama Power Co.*, 196 So.2d 702 (Ala. 1967). The Alabama Supreme Court has stated that the discovery rules "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Ex parte Dorsey Trailers, Inc.*, 397 So.2d 98 (Ala. 1981) (citing *United States v. Procter and Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Further, "a defendant is entitled to determine the factual basis of the plaintiff's claim and all facts going to prove or disprove defendant's defense. *Ex parte Dorsey*, 397 So.2d at 104 (citing 4 Moore's Federal Practice, P 26.57).

Because the plaintiff is proceeding *pro se*, the court recognizes that he is not charged with knowledge of all the rules. However, as stated previously, after reading the deposition transcript in its entirety, the court does not find that counsel for the defendants acted inappropriately in any way. If they had, the plaintiff's proper forum for objecting to their behavior would have been the State Circuit Court. ALABAMA RULE OF CIVIL PROCEDURE 30(d)(4) provides that:

> At any time during the taking of the deposition, on motion of a party or of the deponent and upon showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is

pending or the circuit court where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition ...

Ala. R. Civ. P. 30(d)(4). As such, if the plaintiff thought that defense counsel was acting unreasonably, his objection would have been properly lodged with the Circuit Court at or about the time of the deposition. This Court is not the proper forum for such an objection.

In the instant action, the plaintiff's objections to defense counsel's questioning are couched as a claim for the tort of outrage. While at times during the deposition, defense counsel acted irritated and frustrated at the plaintiff's reluctance and/or refusal to answer questions, irritation and frustration alone do not being to rise to the level of conduct necessary for a tort of outrage claim. The alleged conduct by counsel simply is insufficient as a matter of law to state a claim upon which relief can be granted by this Court.

CONCLUSION

Premised on the foregoing, the defendants' motions to dismiss, which the court has converted to motions for summary judgment, are due to be granted.

Any objections to this report and recommendation must be filed within ten days of the date it is entered by the Clerk of Court and in accordance with Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1).

DONE, this 12th day of November, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 11.12.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
-SOUTHERN DIVISION-

Benon John Trawinski,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	**CIVIL ACTION NO.:**
	*	**CV02-JEO-2396-S**
United Technologies Carrier	*	
Corp. and Comfort Systems,	*	
USA (Owner and parent corp.	*	
of Standard Heating & Air	*	
Conditioning Co.),	*	
	*	
Defendants.	*	

MOTION TO DISMISS AND MOTION FOR SANCTIONS AND ATTORNEYS' FEES

WITHDRAWN as to the motion for sanctions and attorney's fees only.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 3.4.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
COMFORT SYSTEMS , USA,	)	
et al.,	)	
	)	
Defendants.	)	

ORDER

On February 6, 2003, Defendant Comfort Systems, USA, filed a "Motion to Dismiss." (Doc. 11). Any evidentiary material and brief that the defendant intends to file in support of the motion must be filed by **February 21, 2003**. Any evidentiary material and brief that the plaintiff intends to file in opposition to the motion must be filed by **March 7, 2003.** Any reply brief by the movant must be filed by **March 21, 2003**. A hearing on the motion, if deemed necessary, will be set by separate order.

The Clerk is directed to serve a copy of this order upon counsel for the parties.

DONE this 6th day of February, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 2.7.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
COMFORT SYSTEMS , USA,	)	
et al.,	)	
	)	
Defendants.	)	

ORDER

On February 13, 2003, Defendant United Technologies Carrier Corporation filed a "Motion to Dismiss and Motion for Sanctions and Attorney's Fees." (Doc. 13). Any evidentiary material and brief that the plaintiff intends to file in opposition to the motion must be filed by **March 7, 2003**. Any reply brief by the movant must be filed by **March 21, 2003**. A hearing on the motion, if deemed necessary, will be set by separate order.

The Clerk is directed to serve a copy of this order upon counsel for the parties.

DONE, THIS 19TH day of February, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 2.20.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORP. and COMFORT SYSTEMS, USA. (Owner and Parent Corp. of Standard Heating & Air Conditioning Co.),	)	
	)	
Defendants.	)	

ORDER

The plaintiff, Benon John Trawinski, has filed a "Motion for Confirmation," requesting that the court "confirm" that he has 120 days from the date of the filing of the complaint in this action to prefect service. Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 4(m), the plaintiff has 120 days from the filing date to serve the defendants.

The Clerk is **DIRECTED** to serve a copy of this order on the plaintiff.

DONE, this the 24th day of December, 2002.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 12.27.02

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
UNITED TECHNOLOGIES	)	
CARRIER CORP. and	)	
COMFORT SYSTEMS, USA.	)	
(Owner and Parent Corp. of	)	
Standard Heating & Air	)	
Conditioning Co.),	)	
	)	
Defendants.	)	

ORDER

The plaintiff, Benon John Trawinski, has filed a *pro se* complaint, alleging what appears to be claims of invasion of privacy and outrage. (Doc. 1). The plaintiff paid the requisite filing fee but did not provide the Clerk of Court with the necessary items to perfect service of process on the defendants. Additionally, nothing in the file indicates that the defendants have been served with process in any manner consisted with FEDERAL RULE OF CIVIL PROCEDURE 4.

The plaintiff is hereby **ORDERED** to inform this court of his intentions regarding service within eleven (11) days of the date of this order. A failure to respond to this order will result in dismissal of this action. If the plaintiff elects to have the Clerk of this Court perfect service of process on the defendants by certified mail, the plaintiff must provide the Clerk with copies of the complaint, prepared summonses, and pre-paid envelopes made

returnable to the Clerk of the Court within eleven (11) days of the date of this order.

The Clerk is **DIRECTED** to serve a copy of this order on the plaintiff.

DONE, this the 2nd day of October, 2002.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 10.3.02